

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

RPOST HOLDINGS, INC., et al.

Plaintiffs,

v.

EXACT TARGET, INC., et al.

Defendants.

Civil Action No. 2:12-CV-512-MHS-RSP

**JOINT NOTICE REGARDING STATUS OF CALIFORNIA
CO-PENDING LITIGATIONS**

Under the Order to Stay and Administratively Close dated September 29, 2014 entered in the above-captioned case, the parties jointly submit this notice regarding the current status of the California co-pending litigations:

A. Superior Court of California Cases

1. *Kenneth Barton v. RPost International et al. (YC061581) (“the Barton 581 case”).*

As previously reported, Kenneth Barton, a former officer of RPost International, a non-party in the present actions, sued RPost International and four of its five directors, including Zafar Khan and Terrance Tomkow, alleging these parties unlawfully converted his six million shares of RPost International stock. On August 30, 2013, the Superior Court entered Judgment After Trial in favor of Barton and against RPost International Limited, Khan and Tomkow. RPost International, Khan and Tomkow were found jointly and severally liable for \$3.82 million awarded in lieu of a share award, and Barton owns no shares in RPost International. Punitive damages were also imposed against Khan (\$250,000) and Tomkow (\$150,000).

The judgment in the Barton 581 case is on appeal. The California Court of Appeal, Second Appellate Division case is titled *Barton v. RPost International Ltd. et al.*, Case No. B251722. The parties argued the fully-briefed appeal to the court on October 7, 2014. The court is expected to report its decision before January 7, 2015.

2. *Kenneth Barton v. RPost International, RMail Limited and RPost Communications (YC065259) (“the Barton 259 case”).*

As previously reported, Barton sued RPost International, RMail Limited, and RPost Communications alleging that RPost International, Khan and Tomkow fraudulently transferred assets to RMail in 2008 and RPost Communications in 2011. The complaint alleges, among other things:

Plaintiff is informed and believes, and on that basis alleges, that RPost, acting without notice to and approval of all shareholders of RPost, transferred RPost's assets including, without limitation, intellectual property acquisition rights and/or corporate opportunities (including, without limitation, USPTO Patent Nos. 6,182,219 and 6,571,334) and at least \$750,000.00 of RPost's cash to RMail (the “RPost-RMail Asset Transfers”).

Barton seeks to void the transfer of these assets, general damages, an injunction, and the appointment of a receiver to take charge of the transferred assets. RPost disputes the allegations of the complaint and maintains that Barton should take nothing on the relief that he seeks.

The jury trial set to begin on November 3, 2014 was continued by stipulation of the parties until April 21, 2015.

B. United States Bankruptcy Court, Central District of California Proceedings

1. *In re Zafar David Khan, No. 2:13-bk-19713-VZ (Bankr. C.D. Cal., Zurzolo, J.); In re Terrance Alexander Tomkow, No. 2:13-bk-19712-WB (Bankr. C.D. Cal., Brand, J.)*

On August 6, 2014, the Chapter 7 Trustee filed a Motion for Order (1) Authorizing Sale of Estate's Right, Title, and Interest In Personal Property; and (2) Approving Overbid Procedure. The Trustee sought approval to sell various assets of Khan and Tomkow, including any interest,

rights, claims, or title in and/or to any intellectual property of any RPost company, to Kenneth Barton for \$25,000. The court held a hearing on the motion on August 28, 2014 and on September 9, 2014 issued an order denying the motion without prejudice.

On October 23, 2014, the U.S. Bankruptcy Court Appellate Panel of the Ninth Circuit heard argument on Khan's and Tomkow's appeal of the bankruptcy court's ruling that Khan's and Tomkow's personal bankruptcies be converted from Chapter 13 to Chapter 7. The Bankruptcy Appellate Panel is expected to report its decision before December 23, 2014. The Khan and Tomkow appeals are assigned BAP Nos. CC-14-1021 and CC-14-1020, respectively.

On October 23, 2014, the U.S. Bankruptcy Court Appellate Panel of the Ninth Circuit also heard argument on Khan's and Tomkow's appeal of the bankruptcy court's denial of their motions objecting to Barton's claim #5 (Barton's unsecured claim for damages arising from the Barton 581 case) under Section 510(b) of the U.S. Bankruptcy Code. The Bankruptcy Appellate Panel is expected to report its decision before December 23, 2014.

2. *Barton v. Khan, No. 2:13-ap-1752-VZ (Bankr. C.D. Cal., Zurzolo, J.); Barton v. Tomkow, No. 2:13-ap-1751-WB (Bankr. C.D. Cal., Brand, J.).*

As previously reported, on July 29, 2013, Barton filed an adversary proceeding in both the Khan and Tomkow bankruptcy proceedings that included allegations similar to his allegations in the Barton 259 case. Khan and Tomkow dispute these allegations and maintains that Barton should take nothing on the relief that he seeks.

The adversary proceedings are stayed. The next status hearing is set for December 2, 2014.

**3. *Burke et al. v. Khan, No. 2:13-ap-1773-VZ (Bankr. C.D. Cal., Zurzolo, J.);
Burke et al. v. Tomkow, No. 2:13-ap-1774-WB (Bankr. C.D. Cal., Brand, J.)***

As previously reported, on July 29, 2013, Thomas Burke and 126736 Canada, Inc. filed shareholder derivative actions on behalf of RPost International, RPost Communications, and RMail Limited in the Khan and Tomkow bankruptcy proceedings. A first amended complaint was filed on September 12, 2013. A second amended complaint was filed on December 16, 2013. A third amended complaint was filed on June 10, 2014. Khan and Tomkow answered that complaint on July 10, 2014. Previously, the Court had denied Khan's and Tomkow's motion to dismiss the second amended complaint. Khan and Tomkow moved for leave to appeal that decision. On October 6, 2014, the Court denied the motion for leave to appeal.

The adversary proceedings are in the early stages of discovery. On November 14, 2014, the court granted the parties' stipulation to extend the discovery cut-off until July 31, 2015. A status hearing has been set for February 3, 2015.

C. Statements

Plaintiffs' Statement: Plaintiffs maintain that there are no issues concerning ownership or control of the patents-in-suit that need to be resolved through the pending California and U.S. Bankruptcy Court actions. Although Plaintiffs do not agree that the stay should continue, Plaintiffs do not seek an order lifting the stay at this time and recommend that the parties submit their next quarterly status report on March 1, 2015 as required by the Court's Order to Stay and Administratively Close unless there are developments that should be brought to the Court's attention before that date.

Defendants' Statement: Patent ownership and the pending Barton 259 case (the basis of the stay and administrative closure of this matter) are still unresolved. *See* Item A.2., above. Given that the trial in the Barton 259 case was continued to April 21, 2015, based on a stipulation RPost entered into with plaintiff in that case, defendants recommend that each case remain STAYED and ADMINISTRATIVELY CLOSED. Consistent with the Court's Order to

Stay and Administratively Close [Dkt. 90], which ordered the parties to first report to the Court on December 1, 2014 and thereafter quarterly until further order of the Court, Defendants recommend that the next joint status report submission is March 1, 2015.

DATED: December 1, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all who have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Winston O. Huff